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Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

RAYMOND N. SPENCE, LILA M. SPENCE,
GARY W. SPENCE, VICKI L. SPENCE,

Petitioners,

vs.

UNITED STATES OF AMERICA,
STATE OF NEW MEXICO,
DEPARTMENT OF TAXATION & REVENUE,

Respondents.

On Petition for Writ of Certiorari to
the Tenth Circuit Court of Appeal

PETITON FOR WRIT OF CERTIORARI

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5 7 pp

QUESTIONS PRESENTED

1. IN VIEW OF THE ADOPTION OF THE UNIFORM FRAUDULENT TRANSFER ACT (UFTA) BY NEW MEXICO, AND MANY OTHER STATES, DOES THE PRINCIPLE SET FORTH IN *SUMMERLIN v UNITED STATES*, 310 U.S. 414 (1940) APPLY TO FRAUDULENT TRANSFER CLAIMS MADE BY THE UNITED STATES UNDER THE UFTA?

2. DOES THE APPELLATE COURT'S REFUSAL TO RENDER AN ACTUAL, ARTICULATE DECISION ON SEVERAL OTHER ISSUES SO FAR DEPART FROM ACCEPTED PROCEEDINGS AS TO CALL FOR THIS COURT'S EXERCISE OF SUPERVISORY POWER?

3. CAN THE UNITED STATES SUSTAIN A TAX COLLECTION SUIT BASED ON ASSESSMENTS MADE BEYOND THE STATUTE OF LIMITATIONS?

PARTIES

All parties to the proceeding in the court below are listed in the caption, except the following:

FIRST NATIONWIDE MORTGAGE CORPORATION,
5280 Corporate Drive
Frederick, MD 21703

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OPINIONS BELOW

The opinion of the appellate court is published at 86 AFTR2d para 2000-5540. It is not published in the Federal Reporter. It is reprinted in the appendix (p. 13). The order and opinion of the district court is published at 85 AFTR2d para 2000-644. It is not published in the Federal Supplement, and is reprinted in the appendix (p. 20). The order of the appeal court on rehearing is not published, and is reprinted in the appendix (p. 49).

JURISDICTIONAL GROUNDS

Petitioners, Raymond, Lila, Gary, and Vicki Spence, in proper person, respectfully petition this Court for a Writ of Certiorari to review the judgement rendered in this case by the Tenth Circuit Court of Appeals. The opinion was entered on November 15, 2000. Timely petition for rehearing was denied January 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The constitutional and statutory provisions involved in the case are as follows:

Tenth Amendment, United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

New Mexico Statutes Annotated (NMSA) §56-10-23. Extinguishment of Cause of Action.

A cause of action with respect to a fraudulent transfer or obligation under the Uniform Fraudulent Transfer Act [56-10-14 NMSA 1978] is extinguished unless action is brought:

A. under Paragraph (1) of Subsection A of Section 5 [56-10-18 NMSA 1978] of the Uniform Fraudulent

Transfer Act, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

B. under Paragraph (2) of Subsection A of Section 5 or Subsection A of Section 6 [56-10-19 NMSA 1978] of that act, within four years after the transfer was made or the obligation was incurred; or

C. Under Subsection B of Section 6 of that act, within one year after the transfer was made or the obligation was incurred.

26 U.S.C. 6501. Limitation On Assessment and Collection.

(a) General Rule.

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed)....

26 U.S.C. 6502. Collection after Assessment.

(a) Length of Period.

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax....

STATEMENT OF THE CASE

The complaint in this matter was filed June 23, 1998 against petitioners Raymond & Lila Spence ("Spences") for tax claims pertaining to the years 1979-1981. Also named as defendants were their son and daughter-in-law Gary & Vicki Spence, First Nationwide Mortgage Corporation, and New Mexico Taxation and Revenue Department (which claimed state tax liens). The asserted basis of federal jurisdiction was 26 U.S.C. §7403. The complaint sought to reduce alleged tax assessments to judgment and foreclose alleged liens. In a separate cause of action purportedly under the New Mexico Uniform Fraudulent Conveyance Act (which had been repealed in 1989 and replaced with the Uniform Fraudulent Transfer Act), the complaint also sought to set aside three property conveyances made by Spences over 15 years prior to the complaint being filed.

The United States' complaint generally alleged Raymond & Lila Spence owed taxes for the years 1979, 1980, and 1981, with alleged assessment dates of June 1989 and June 1990. Attached to the complaint were Internal Revenue Service transcripts which showed returns filed by Spences for each of the years on November 11, 1982. The complaint did not allege any fraud or anything else regarding any of the returns which would have extended the general 3 year period for making assessments. The complaint also alleged that Raymond and Lila Spence owed frivolous return penalties which had been assessed regarding the years 1979, 1980 through 1986, and 1991. However, no such "frivolous returns" were ever produced at any time.

The complaint further alleged conveyances of three pieces of real property from Raymond & Lila Spence to a third-party (not enjoined in the suit) between March 1979 and March 1983, who then conveyed the properties to Gary Spence in April 1988. It alleges these properties are encumbered by tax liens for its tax claims, the properties were fraudulently conveyed by Raymond & Lila Spence, that the transfers were shams, and that Gary (and Vicki)

Spence are "nominees" of Raymond & Lila Spence. On March 18, 1994 the United States recorded a purported "nominee" tax lien against Gary Spence for tax claims solely against Raymond & Lila Spence.

Raymond, Lila, Gary, and Vicki Spence's respective amended answers asserted various defenses, including the fraudulent transfer claim was extinguished prior to the suit. All Spences also alleged a counter-claim for quiet title against the U.S. tax liens, and cross-claim against the State of New Mexico for quiet title against its tax lien claims regarding the years 1979-1981.[1]

A bench trial was held on July 19, 1999. No pre-trial order was filed until the day *after* trial. The State of New Mexico filed a disclaimer of interest, and did not participate in the trial. The trial court ruled in the United States' favor on all issues. However, it failed to address Spences' cross-claim against New Mexico in its 'final' judgement. (As noted by the appellate court decision (footnote 1), the appeal was almost dismissed due to this issue. However, after raising this issue on its own, the appeals court amazingly failed to address it *at all* in its decision, and even on Spence's petition for rehearing).

On appeal, Spences' raised six specific issues: the alleged assessments were beyond the limitation period; lack of evidence for authorization of the suit pursuant to 26 U.S.C. §7401; a missing intermediate property transferee that was an indispensable party; lack of any evidence whatsoever of any alleged 'frivolous returns' (the trial court made no finding that any such returns were ever filed); erroneous dismissal of their cross-claim against New Mexico; and the United States' fraudulent transfer claims were extinguished prior to the filing of its complaint. New Mexico filed no brief and did not participate in the appellate proceedings at all.

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[1] Pursuant to the respective state and federal laws, each government tax lien claim attached to *all* property of the Spence's, not just the real estate at issue in the United States' suit.

In its "decision", the appellate court simply 'blew off' 5 of the 6 issues with the mere statement "the United States refutes all of appellants claims". (Appendix, at 16). This apparently included the arguments Spence's raised regarding New Mexico, even though the United States obviously had no standing (and presented no argument whatever) on that issue. The sole issue the appellate court gave any discussion on was the one regarding fraudulent transfer, where it held the extinguishment provision of New Mexico's fraudulent transfer law (UFTA) did not apply to the United States, citing *United States v Summerlin*, 310 U.S. 414 (1940). It further held the time limit for the United States for bringing fraudulent transfer claims is governed by 26 U.S.C. §6502(a) (10 years to collect on an tax assessment). Spences' petition for rehearing was summarily denied on January 10, 2001.

REASONS FOR GRANTING PETITION

ARGUMENT ON QUESTION #1

On the first question, this case presents a monumental issue of state sovereignty. It presents the issue of whether or not any state in this entire country has the right to legislate regarding property rights (and alleged fraudulent transfers), and have it apply universally, including application to the federal government.

In 1984 the Commission on Uniform Laws proposed the Uniform Fraudulent Transfer Act (UFTA) for adoption by the various States of the union. In its commentary, the Commission explicitly stated one of the purposes of the Act was to bar actions by the United States under the *Summerlin* principle. UFTA §9, 7A U.L.A. 665-66 (1984) (commentary). This was to be accomplished by replacing the various state "statute of limitation" periods for fraudulent transfer claims with an "extinguishment" provision that would extinguish the entire claim, as opposed to merely barring the remedy. Between 1985 and 1996, 37 States and the District of Columbia have adopted the UFTA. 7A U.L.A. at 266-67 (1999). New Mexico

did so in 1989, and, along with 20 other states, simultaneously repealed its Uniform Fraudulent Conveyance Act (which contained a statute of limitation). Id, at 271-273; New Mexico Statutes Annotated (NMSA) 56-10-1, et seq. New Mexico courts have recognized the difference between the old and new statutory schemes. *First Southwestern Financial Services v Pulliam*, 912 P.2d 828, 121 NM 436, 438 (1996) (UFTA extinguishes cause of action rather than simply blocking remedy, as under prior law).

Despite the above changes in law by many states, the lower federal courts, as in the instant case, continue to ignore the change and blindly recite the *Summerlin* principle when the United States sues under state fraudulent transfer laws. *Karras v Karras, and United States*, 16 F.3d 245, 247 (8th Cir 1994) (citing the pre-UFTA case of *United States v Wurdemann*, 663 F.2d 50 (8th Cir 1981)); *United States v Bacon*, 82 F.3d 822 (9th Cir 1994) (citing the pre-UFTA case of *United States v Vernon*, 640 F.2d 609 (5th Cir 1981)). In fact, both of the above cases claimed ability to resurrect long repealed state fraudulent conveyance laws in order to get around the UFTA law existing at the time of suit. *Karras*, 16 F.3d at 247 (summarily concluding, with no analysis, that repealed South Dakota law should be applied 'because it was law existing at time of transfer'); *Bacon*, 82 F.3d at 824 (applying repealed Washington state law for same reason). In none of these decisions was there any discussion or reason set forth for dispensing with the well established principle and requirement of this Court for applying the law existing at the time of decision. *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974). Moreover, for a federal court to apply repealed state laws in this context presents a serious question of state legislative vs. judicial authority. By repealing such laws, the State legislative intent should be clear that said law is no longer to be used. This intent would only be enhanced by enacting a replacement law. For a federal court to continue to use repealed laws in these circumstances is a

clear defiance of State legislative authority.

In its recent decision in *Bresson v Commissioner*, 213 F.3d 1173, 1179 (9th Cir 2000), the Ninth Circuit plainly recognized the extinguishment purpose of the UFTA, and went so far as to state that States "transgress the limits of state power when they attempt to set limitations on claims acquired by the United States". This can be described as nothing less than a monumental dispute over state and federal legislative authority and power. While the States are exerting what would appear to be a legislative power entirely within their domain, the lower federal courts apparently disagree when it comes to claims asserted by the United States, even though the claim is made under, and exists only because of, State law. At least one court has held this issue presents questions of Tenth Amendment proportions to state sovereignty. *United States v Vellalos*, 780 F.Supp. 705, 707-708 (D.Hawaii 1992) (now disapproved by *Bresson*). Clearly, the state legislatures that adopted the UFTA (and the state courts that have applied that law), are at odds with the lower federal judiciary. In *United States v California*, 507 U.S. 746, 758 (1993), this Court left open the question of whether the United States is subject to federal or state limitations in a state-law action. Such a fundamental, and nationally important dispute over State legislative power should clearly be resolved by this Court.

Over the past few decades, the United States has brought numerous tax collection suits with a separate claim under state laws for setting aside conveyances, and continues to do so today. The States that have adopted the UFTA have attempted to set an absolute deadline for any and all fraudulent conveyance claims brought under *their* laws.[2]

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[2] In 1990 Congress enacted its own fraudulent transfer laws as part of its Federal Debt Collection Procedure Act. 28 U.S.C. §3001, et seq. Similar to the UFTA laws of the various states, the portion of this scheme relating to fraudulent transfer procedures (§3301, et seq) also contains a 6 year '*extinguishment*' clause at §3306(b).

regardless of who may bring it. Under the UFTA adopted by the various States, if no claim is made within the time allowed, the claim is not simply barred—*it no longer exists*. Among the purposes of doing this would obviously be to maintain some amount of certainty in real estate and other transactions. The instant case is particularly egregious since it asserts the authority to reach back to transactions that occurred approximately *15 years* prior to the suit, with a virtual complete disregard for the State law that was specifically identified in the cause of action.

ARGUMENT ON QUESTION #2

On the second question presented, Spences contend the appellate court's cryptic statement that "the United States refutes all of appellant's claims" is not an actual decision or adjudication on any of the 5 issues it was purportedly addressing. This is especially true for the issue of the cross-claim against New Mexico, something for which the United States would obviously not (and did not) present any argument at all. The lower court did not hold the issues were frivolous, or even meritless; and they obviously are not. However, instead of rendering any sort of articulate decision, the appeal court apparently decided not to address the issues at all, and made a completely arbitrary ruling. This Court has found similar practices totally unacceptable. *Burlington Truck Lines v United States*, 371 U.S. 156, 167-8 (1962) (administrative adjudicatory practice is unacceptable where no findings or analysis to justify decision). Surely, if such a practice is unacceptable from an administrative agency, it is no more acceptable from a federal court, especially an appellate court.

The lower court made an articulate ruling on the issue of the UFTA. However due to its abject failure to articulate an actual adjudication or decision on other issues for which Spences would seek review in this Court, there is nothing else appealable or reviewable in this Court. These types of "decisions" should not only support granting certiorari (for supervising control and vacation of lower

court 'decision'), but would even support a writ of mandate since they amount to refusal to adjudicate and obstruction of the appeal process. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978) (court may issue writ "in order that [it] may exercise the jurisdiction of review given by law," and avoid obstruction of appeals); *Thermtron Products, Inc., v. Hermansdorfer*, 423 U.S. 336, 352 (1976) ("Repeated decisions of this Court have established the rule . . . that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause.")

The lower court's denial of the petition for rehearing shows it steadfastly refuses to make an actual adjudication on the other issues Spences presented to it. Since the other issues Spences would seek review on in this Court have no actual, articulable ruling from the appeals court, as far as Spence's can see, they leave nothing for this Court to review. This lack of real, actual ruling is obstructing and impeding this Court's ability to exercise its jurisdiction of review. Therefore, this Court should grant this petition, exercise its authority for supervising control, and order the lower court to actually adjudicate the other issues with an analytical and articulate decision on the issues Spences presented to it. Otherwise, the lower court's action would result in obstruction and evasion of review of other possible issues.

ARGUMENT ON QUESTION #3

In the event this Court disagrees with Spences on the above issue and deems the appellate court ruling sufficient, Spences have presented the third question regarding collection suits based on untimely assessments. This Court has already ruled that untimely assessments will not support any tax collection suit. *United States v. Updike*, 281 U.S. 489, 496 (1930). There is an obvious assessment timeliness question in this case since it involves returns filed in 1982, but no alleged assessments until 1989. The trial court ruled that, based on the appellate court's purported ruling from a prior case,

Spences had filed "incomplete, false, or fraudulent" returns "with intent to evade tax". Despite the fact that no such ruling had ever been made (not to mention the fact that no such fraud allegations appeared in the complaint, and no such issue appeared in any pre-trial order[3] (because none was filed prior to trial)), it then went on to hold that the three year assessment rule did not apply, but cited no statutory exception whatever. Since the appellate court completely failed and refused to make any articulate decision on the issue, it also failed to shed any light on any statutory exception to the 3 year assessment limitation period it may have been relying on. Instead, all that exists is its cryptic statement "the United States refutes all of appellants' claims".

It is a well established principle of statutory construction that any doubt must be resolved in favor of a general provision and against any exception. *United States v First City National Bank*, 386 U.S. 361, 366 (1967); also see E. Crawford, *The Construction of Statutes*, section 299, at 610 (1940). Here, the general provision is a 3 year limitation on assessment. Anything else is an exception to the general rule. In view of the appellate court's refusal to articulate any reason whatever for applying any exception to the general rule, there can be no question of the existence of doubt about what rule should apply. Therefore, the general 3 year rule should have prevailed. The appellate court's refusal to set forth any analysis or justification for its ruling, combined with its failure to follow this Court's precedent regarding statutory construction warrants review by this Court.

CONCLUSION

In view of the absence of any reasoning or justification for the ruling of the appeals court on five of the six issues

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[3] Although Spences argued on appeal that due to these circumstances the trial court could not even reach any issues of purported fraud in returns, etc, the appellate court refused to address it in its ruling.

presented to it, especially the assessment limitation issue, Spences would first request that this Court grant this petition, order the lower court to vacate its ruling, and render an actual, articulate decision which contains at least *some* analysis/ justification for any decision it makes on the issues presented; something more than the mere cryptic statement "the United States refutes all of appellants' claims". This sort of statement leaves nothing for this Court to actually review on any other issue Spences would like to present to this Court, and is obstructing and hindering the appeals process.

In the alternative, if this Court finds the appellate court ruling is sufficient as a 'decision', it should grant this petition to consider a profound issue that goes to the very core of difference between State and federal power: the authority of the States to legislate regarding property rights. It is a question of Tenth Amendment proportion, and unquestionably important to many States and their citizens. This Court should also summarily reverse the lower court's decision upholding a tax collection suit which was based on obviously untimely assessment claims, and does not bother to cite any statutory exception allowing any longer limitation period.

DATE: April 3, 2001.

Submitted by,

Raymond N. Spence
Lila M. Spence
Gary W. Spence
Vicki L. Spence

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Counter-Defendant-Appellee

v.

RAYMOND N. SPENCE; LILA M. SPENCE; GARY WAYNE SPENCE; VICKI L. SPENCE,

Defendants-Counter-Claimants-Cross-Claimants-Appellants,

and

STATE OF NEW MEXICO DEPARTMENT OF TAXATION AND REVENUE,

Defendant-Counter-Claimant-Cross-Defendant-Appellee.

FILED
United States Court of Appeals
Tenth Circuit

NOV 15 2000

PATRICK FISHER
Clerk

Nos. 99-2325 & 99-2345
(D.C. No. CIV-98-757-JP) (D. N.M.)

ORDER AND JUDGMENT*

Before **BALDOCK**, **KELLY**, and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

The United States commenced this action to reduce to judgment federal tax assessments against Lila and Raymond Spence (collectively, "the taxpayers"). It also sought to set aside as fraudulent the taxpayers' conveyance of three parcels of property located in New Mexico, to foreclose tax liens on those properties, and to obtain a deficiency judgment for any deficiency remaining after the sale of the properties. The United States named as defendants in the action all known parties having an interest in the three parcels of property, including Gary and Vicki Spence (the taxpayers' son and daughter-in-law, to whom title to the properties had been transferred), and the New Mexico Department of Taxation and Revenue which had filed its own tax liens against the properties). The taxpayers and Gary and Vicki Spence filed cross-claims against the New Mexico Department of Taxation and Revenue seeking to invalidate the State's tax liens against all of the taxpayers' property.

After a bench trial, the district court concluded that the taxpayers were liable to the United States for federal income taxes for tax years 1979, 1980, and 1981, and that

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

the taxpayers were liable for tax penalties for tax years 1979 through 1986 and 1991. The court further concluded that the transfers of property From the taxpayers to the Universal Church of Taurus and thence to Gary and Vicki Spence were fraudulent under New Mexico law and were void as to the United States. The court concluded that the transfers should be set aside and the Federal tax liens foreclosed on those properties. Accordingly, the court entered judgment for the United States and against the taxpayers, set aside the property transfers, and ordered the properties sold to satisfy the federal tax debt.

The taxpayers appealed the district court's decision, as did Gary and Vicki Spence, and we consolidated the two appeals for briefing and disposition. We exercise jurisdiction over the appeals pursuant to 28 U.S.C. § 1291,[1] and we affirm in part and reverse in part.

Appellants raise six challenges to the district court's rulings. First, they contend that the tax assessments were outside the general three-year limitations period contained in 26 U.S.C. § 6501(a), and that the United States could not rely on the exception to the general limitations period for false or fraudulent returns found in 26 U.S.C. § 6501(c). Second, appellants argue that the district court should have dismissed the suit because the United States did not present proper evidence that the suit was authorized by the Secretary of the Treasury, as required by 26 U.S.C. § 7401. Third, appellants contend that the Universal Church of Taurus was a necessary and

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We initially questioned whether we had jurisdiction to hear these appeals because the district court's decision did not expressly dispose of appellants' respective cross-claims against the New Mexico Department of Taxation and Revenue. Accordingly, we ordered appellants to obtain from the district court and present to this court either an appropriate certification under Fed. R. Civ. P. 54(b) or a final judgment adjudicating all remaining claims. Appellants complied with our order by obtaining a final order from the district court, which dismissed the cross-claims as moot. The district court having now adjudicated all the claims before it, we have jurisdiction to review these appeals under 28 U.S.C. § 1291.

indispensable party that the court should have required the United States to add as a party-defendant, and that the district court erred in adjudicating the church's property rights in its absence. Fourth, appellants contend that the district court erred in holding the taxpayers liable for frivolous return penalties under 26 U.S.C. § 6702. Fifth, appellants argue that the district court erred in dismissing their respective cross-claims against the New Mexico Department of Taxation and Revenue as moot, because the claims sought to invalidate the state's tax liens on more property than that in which the United States claimed an interest. Finally, appellants contend that the district court erred in setting aside the transfers of property because the United States' fraudulent transfer claims were extinguished by operation of state law before the United States filed suit.

The United States refutes all of appellants' claims, except their fifth claim–on which the United States takes no position– and portions of their fourth claim. As to the latter, the United States concedes that judgment should not have been entered against Raymond Spence for frivolous return penalties for tax years 1979, 1980 and 1981, and that judgment should not have been entered against Lila Spence for frivolous return penalties for any of the tax years at issue.

We review the district court's findings of fact for clear error and its conclusions of law de novo. *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000). We review the district court's evidentiary rulings for an abuse of discretion, *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1433 (10th Cir. 1993). To the extent that appellants' arguments seek a review of the sufficiency of the evidence or otherwise require a review of the trial transcript, those arguments are deemed waived by appellants' failure to provide us with a transcript of the trial, as required by Fed. R. App. 10(b)(1), (2) and 10th Cir. R. 10.1(A)(1). E.g., *United States v. Vasquez*, 985 F.2d 491, 495 (10th Cir. 1993) ("By failing to file a copy of the trial transcript as part of the record on appeal, the appellant waives any claims concerning the sufficiency of the evidence at trial.").

We have carefully reviewed each of appellants' claims and, based upon the parties' briefs, the record, and the pertinent law, we conclude that the district court did not commit reversible error, with the exception of the two points on which the United States concedes error. The district court's orders are, therefore, reversed only as to those two points.

On our view, only appellants' challenge concerning the government's fraudulent conveyance claims warrants further explication. The district court found the following pertinent facts. The taxpayers purchased the three parcels of property at issue in 1965, 1976, and 1983, respectively. By March 30, 1983, the taxpayers had deeded each of the properties to the Universal Church of Taurus, a sham church they created and used for the purposes of evading taxes. On March 31, 1988, the taxpayers deeded each of the properties to their son Gary by special warranty deed. On April 7, 1988, the taxpayers, individually and as trustees of the church, and Gary and Vicki Spence, as trustees of the church, deeded each property to Gary by special warranty deed.

The United States sought to set aside these conveyances, arguing that they were fraudulent under New Mexico law. The United States relied upon New Mexico's Uniform Fraudulent Conveyances Act ("UFCA"), N.M. Stat. Ann. § 56-10-1 to -13 (repealed), which was in effect at the time the transfers were made. New Mexico repealed its UFCA effective June 16, 1989, and replaced it with the Uniform Fraudulent Transfer Act ("UFTA"), N.M. Stat. Ann. § 56-10-14 to -25. See 1989 N.M. Laws ch. 382, §13. The UFTA was the law in effect when the United States filed suit in June 1998.

The district court concluded that the UFCA, not the UFTA, properly applied to the United States' claims because the UFCA was the law in effect at the time of the conveyances. The court further concluded, however, that it mattered little which statute applied, because appellants' conduct was fraudulent under either statute and there was no material difference between the two statutes.

Appellants do not challenge the district court's findings that their conduct was fraudulent under either statute. Rather, they challenge the court's conclusions that the

UFCA applied to the United States' claims and that there is no material difference between the two statutes. In particular, they argue that the UFTA contains a claim-extinguishment provision that differs significantly from the provisions of the UFCA, and that this provision extinguished the United States' fraudulent conveyance claims before it filed suit.

Appellants are correct that the UFTA contains a claim-extinguishment provision, N.M. Stat. Ann. §56-10-23, which has no analogue in the UFCA. Under § 56-10-23, a cause of action for a fraudulent transfer under the UFTA must be brought within one year or four years after the transfer, depending on the section under which the claim is brought. In addition, the UFTA also provides an additional, though shorter, time period to guard against the potentially harsh application of the four-year extinguishment provision. The second clause of Section 56-10-23(A) provides a period of "one year after the transfer or obligation was or could reasonably have been discovered by the claimant." The plain language of the statute makes the one-year "safety valve" limitations period available to all claimants under the UFTA. *First Southwestern Fin. Servs. v. Pulliam*, 912 P.2d 828, 830 (N.M. Ct. App. 1996). Unlike the UFTA, the UFCA does not contain its own statute of repose or limitation. See N.M. Stat. Ann. § 56-10-1 to -13 (1988). Fraudulent conveyance claims under the UFCA are therefore governed by the four-year statute of limitations generally applicable to fraud claims. N.M. Stat. Ann. § 37-1-4; *Dow v. Chilili Coop. Ass'n*, 728 P.2d 462, 464 (N.M. 1986).

Regardless of which statute of limitations applies, "the United States is not bound by state statutes of limitation ... in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940); see also *Bd. of County Comm'rs for Garfield County, Colo. v. W.H.I., Inc.*, 992 F.2d 1061, 1065 (10th Cir. 1993) ("[A] state's statute of limitations does not apply to an action brought by the federal government to vindicate public rights or public interests, absent a clear showing of contrary congressional intent.") (internal quotations and citation omitted). Instead, the United States is governed by 26 U.S.C.

§6502(a), which gives the government ten years from the date of the deficiency assessment to institute a proceeding to collect on the assessment. E.g., *Foutz v. United States*, 72 F.3d 802, 803 (10th Cir. 1995). The United States made the first assessment against the taxpayers on March 29, 1989, and it instituted suit on June 23, 1998. Accordingly, we need not address the question of retroactivity because the United States' fraudulent conveyance claims were timely filed under either statute.

In sum, the district court properly entered judgment against both Lila and Raymond Spence for federal income taxes for tax years 1979, 1980, and 1981, and it properly entered judgment against Raymond Spence for civil penalties for tax years 1982 through 1986 and 1991. The court erred, however, in entering judgment against Raymond Spence for civil penalties for tax years 1979 through 1981, and in entering judgment against Lila Spence for civil penalties for tax years 1979 through 1986 and 1991. The court also properly set aside the property conveyances as fraudulent, foreclosed the federal tax liens against the properties, and ordered the properties sold.

Therefore, we REVERSE the district court judgment against Raymond Spence for civil penalties under 26 U.S.C. § 6702 for tax years 1979 through 1981. We also REVERSE the district court judgment against Lila Spence for civil penalties under 26 U.S.C. § 6702 for tax years 1979 through 1986 and 1991. In all other respects, we AFFIRM the district court's judgment.

Entered for the Court

Bobby R Baldock
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
U.S. DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
SEP 28 1999

UNITED STATES OF AMERICA
Plaintiff,

v.

RAYMOND N. SPENCE, LILA M. SPENCE, GARY WAYNE SPENCE, VICKI L. SPENCE, FIRST NATIONWIDE MORTGAGE CORPORATION, STATE OF NEW MEXICO DEPARTMENT OF TAXATION and REVENUE,

Defendants.

CIVIL NO.
CV-98-757-JP

FINAL JUDGMENT

Came on for non-jury trial on. July 19, 1999, the action of the United States of America to reduce to judgment certain income tax claims of the Internal Revenue Service; its action to set aside fraudulent conveyances from defendants Raymond N. Spence and Lila M. Spence to defendants Gary Wayne Spence and Vicki L. Spence; and the United States' action to foreclose its federal income tax liens upon the three subject real properties and to sell the three subject real properties, which are more fully described as follows:

1. The first real property, 2617 Mesa Drive, Farmington, New Mexico (hereafter "the Mesa property") property is more particularly described as follows:
   Lot Thirteen (13) and the north five (5) feet of Lot Twelve (12) in Block Six (6) of SUNSET HEIGHTS SUBDIVISION NUMBER TWO in the City of Farmington, San Juan County, New Mexico.

2. The second real property, 1404 and 1404½ Sullivan, Farmington, New Mexico (hereafter "the

Sullivan property") is more particularly described as follows:
Lots Four (4) and Five (5) in WEBB SUBDIVISION # 1 in the City of Farmington, according to the plat thereof filed for record in the Office of San Juan County Clerk on May 3, 1956.

3. The third real property, 200 South Gower, Farmington, New Mexico (hereafter "the South Gower" property) is more particularly described as follows:
0.87 acres, more or less, in the Northwest Quarter of the Northwest Quarter (NW1/4NW1/4) of Section Seventeen (17), in Township Twenty-Nine (29) North of Range Thirteen (13) West, N.M.P.M., San Juan County, New Mexico, described as follows: BEGINNING at the Southeast corner of Lot Eleven (11), in Block One (I) of the Addition to the West Apache Subdivision, as filed for record March 8, 1955;

THENCE North 7.2 feet;
THENCE East 82.5 feet;
THENCE South 111.0 feet;
THENCE South 77 degrees 36 minutes West 284.6 feet;
THENCE North 164.9 feet;
THENCE East 195.5 feet to the point of beginning.

This Court found, pursuant to Findings of Fact and Conclusions of Law entered on August 12,1999, and incorporated herein as if fully restated, that defendants Raymond and Lila Spence were indebted to the United States for federal income taxes for the years 1979, 1980 and 1981 and that they were indebted to the United States for tax penalties pursuant to 26 U.S.C. §6702 for periods 1979 through 1986 and 1991.

This Court found that the deed and property transfers from defendants Raymond N. Spence and Lila M. Spence to a sham church and then additional transfers to defendants Gary Wayne Spence and Vicki L. Spence were fraudulent under the New Mexico Uniform

Fraudulent Conveyance Act, N.M. Stat. Ann. §56-10-1 to -13 (1986) and that these subject transfers are void as to the United States Internal Revenue Service, a preexisting creditor of defendants Raymond N. Spence and Lila M. Spence. The defendants Raymond N. Spence and Lila M. Spence are the true, actual, sole and equitable owners of the three subject real properties described above.

This Court found that the federal tax liens of the United States should be foreclosed against the three subject real properties described above together with all improvements thereon and determined that the three subject real properties shall be seized and sold by the United States Marshal for New Mexico, at public auction in accordance with 28 U.S.C. §2001 and 2002. Accordingly, it is hereby,

ORDERED, ADJUDGED AND DECREED that the Plaintiff, the United States of America has final judgment against the Defendant, Raymond N. Spence in the amount of $212,098.39 as calculated to September 17, 1999, which amount includes statutory interest and penalty to that date, and which represents the balance of the unpaid federal income taxes for the taxable years ended December 31, 1979, December 31, 1980, and December 31, 1981, and for civil penalty under 26 U.S.C. §6702 for the year 1991. It is further,

ORDERED, ADJUDGED AND DECREED that the Plaintiff, the United States of America has final judgment against the Defendant, Lila M. Spence in the amount of $212,098.39 as calculated to September 17, 1999, which amount includes statutory interest and penalty to that date, and which represents the balance of the unpaid federal income taxes for the taxable years ended December 31, 1979, December 31, 1980, and December 31, 1981. It is further

ORDERED, ADJUDGED AND DECREED that the transfers of the three subject real properties from defendants Raymond N. Spence and Lila M. Spence to the Universal Church of Taurus and the subsequent transfers from Raymond N. Spence and Lila M. Spence, individually, and as Trustees of the Universal Church of Taurus to defendants Gary and Vicki Spence are determined to have been fraudulent under the New

Mexico Uniform Fraudulent Conveyance Act, N.M. Stat. Ann. 56-10-1 to -13 (1986) and that the transfers of the three subject real properties by Raymond and Lila Spence are void as to the United States of America. Neither the Universal Church of Taurus nor Gary and Vicki Spence have an ownership interest in the three subject real properties. The defendants Raymond N. Spence and Lila M. Spence are the true, actual, sole and equitable owners of the three subject real properties described above. It is further,

ORDERED, ADJUDGED AND DECREED that the federal tax liens of the United States are foreclosed against the three subject real properties described above, together with all improvements thereon. It is further,

ORDERED, ADJUDGED AND DECREED that the real property shall be seized and sold by the United States Marshal for New Mexico, at public auction in accordance with 28 U.S.C. §§ 2001 and 2002. It is further,

ORDERED, ADJUDGED AND DECREED that a Notice of Sale shall be published once a week for at least four weeks prior to the scheduled sale in a newspaper regularly issued and of general circulation in the San Juan County, New Mexico area. Said notice shall describe the three subject tracts by legal description in the notice. It is further,

ORDERED, ADJUDGED AND DECREED that the terms and conditions of the sale shall be as follows:

(a) The three properties shall be sold separately at public sale at the courthouse door, of the San Juan County or Albuquerque Federal Courthouse, as selected by the United States Marshals office. The location of the sale shall be in the Notice of Sale.

(b) The terms of sale shall be cash. The successful bidder for each respective property, called purchaser herein, shall be required to deposit with the United States Marshal cash equal to twenty percent of his total bid immediately upon the property being struck off and awarded to him as the highest and best bidder, and the remaining eighty percent of said purchase price shall be paid on or before 5:00 p.m. on the date five days from the date of sale. Should the successful bidder, or purchaser, fail to comply with or complete the terms of the sale, the

purchaser shall be liable to the plaintiff for twenty percent of the value of the property thus bid off as a penalty, in addition to costs and expenses. Said penalty shall be recovered on motion, five days notice of such motion being given to such purchaser; and said deposit by purchaser shall be paid over and delivered to plaintiff to be applied toward payment of said penalty. Payment of said penalty by purchaser shall be a credit on the judgment of plaintiff against defendants Raymond N. Spence and Lila M Spence. If a default occurs by the first purchaser, the subject real property shall be again offered for sale in the same manner as set forth herein.

(c) The United States Marshal shall make his report of sale for each of the three properties within ten (10) days from the date of sale.

(d) If no objections to a sale have been filed in writing in this action with the Clerk of the Court by 10:00 a.m., fifteen (15) days from date of a sale, the sale shall be confirmed without necessity of motion, or upon motion of the plaintiff, the purchaser, any party in interest in this cause, or by the Court upon its own motion, and the United States Marshall shall be directed to deliver his deed without warranty to said purchaser.

(e) In the event the United States Marshal is unable to sell the subject real property in accordance with the terms and conditions set forth in this judgment, the United States Marshal shall again offer the subject property for sale at a public auction, to be announced. by the United States Marshal, after again being advertised at least once each week for four consecutive weeks preceding the date fixed for such sale in a daily newspaper of general circulation in San Juan County, New Mexico, and by such notice as the United States Marshal shall deem appropriate. The notice of sale shall contain the terms and conditions of sale as set forth above.

(f) The United States Marshal shall apply the proceeds of the sale first to reasonable and necessary costs of sale, then to unpaid ad valorem taxes ,then to any lien of FirstNationwide Mortgage Corporation in accordance with the previously filed stipulation in the case, and then the balance of the proceeds of the sale should be applied in satisfaction of the plaintiffs income tax judgment (for

tax liens), then to satisfy the United States' legal and court costs in this action and then the Marshal shall pay over the excess to defendants Raymond N. Spence and Lila M. Spence.

If the proceeds of such sale are insufficient to pay off and satisfy the judgment and the liens of the United States of America and the interest thereon, a deficiency judgment will be entered. It is further,

ORDERED, ADJUDGED AND DECREED Raymond and Lila Spence, and anyone living in any of the three subject real properties with their permission, vacate the three subject real properties at least 10 days prior to the date of the sale which is scheduled by the United States Marshals. It is further,

ORDERED, ADJUDGED AND DECREED that the United States Marshals take possession of the three subject properties at the time they are vacated by defendants Raymond and Lila Spence and those on the subject real properties that had the Spence's permission.

This is a Final Judgment.

The Clerk will enter this Final Judgment and provide all parties with a copy.

Signed this 28th day of September, 1999.

/s/ _____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
U.S. DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
AUG 12 1999

UNITED STATES OF AMERICA
Plaintiff,

v.

RAYMOND N. SPENCE, LILA M. SPENCE, GARY WAYNE SPENCE, VICKI L. SPENCE, FIRST NATIONWIDE MORTGAGE CORPORATION, STATE OF NEW MEXICO DEPARTMENT OF TAXATION and REVENUE,

CIVIL NO. CV-98-757-JP

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties presented their evidence at a non-jury trial on July 19, 1999. At trial, defendants objected to the admission into evidence of plaintiffs exhibits 2a, 2b and 2c---photocopies of official public records of San Juan County New Mexico upon the ground that they lacked authenticity. I gave plaintiff until July 23, 1999 to submit properly certified, authenticated copies of exhibits 2a, 2b and 2c. Plaintiff timely submitted certified copies of exhibits 2a, 2b and 2c, properly certified in accordance with Federal Rule of Evidence 902(1) and 902(4); and I have admitted exhibits 2a, 2b and 2c into evidence and, in addition, have taken judicial notice of the content of exhibits 2a, 2b and 2c which are properly recorded official

public records of San Juan County, New Mexico. Having considered the evidence, I now make the following findings of fact and conclusions of law under Fed.R.Civ.P. 52(a).

Findings of Fact

1. On June 23, 1998, Plaintiff United States of America filed this action under 26 U.S.C. §7401 and 7403 to reduce outstanding federal tax assessments against Defendants Raymond N. Spence and Lila M. Spence to judgment.

2. Plaintiff was authorized to bring this suit pursuant to 26 U.S.C. §7401 as evidenced by the unchallenged affidavit of Denise G. Dengler, Assistant United States Attorney, Department of Justice, and a redacted copy of the letter from the Albuquerque District Counsel to the Department of Justice which directs the Tax Division to take the necessary steps to institute legal proceedings in this case.

3. Defendants Raymond N. Spence and Lila M. Spence, husband and wife, reside at 2617 Mesa Drive, Farmington, New Mexico 87401.

4. Defendant Gary Wayne Spence, son of Defendants Raymond and Lila Spence, resides at 108 Whitley Drive, Warner Robbins, Georgia with his wife, Defendant Vicki L. Spence.

5. Defendant State of New Mexico, Department of

Taxation and Revenue, has disclaimed any and all of its interests in this matter.

6. Defendant First Nationwide Mortgage Corporation, as the successor in interest to Four Corners Savings & Loan Association, currently holds a mortgage on the "Sullivan" property which was recorded on March 15, 1 979 at the San Juan County Clerk's Office in New Mexico at Book 850, Page 28.

7. Plaintiff requests the Court to satisfy its judgment against Defendants Raymond and Lila Spence by: (1) setting aside fraudulent conveyances of certain real properties; (2) foreclosing federal tax liens against certain real properties; (3) obtaining a sale of such properties; and, (4) obtaining a judgment for any amount remaining unpaid after the distribution of the proceeds generated by the sale of the subject real properties. Plaintiff seeks satisfaction of its judgment through the foreclosure sale of three parcels of real property.

8. The first parcel of real property subject to this civil action is located at 2617 Mesa Drive, Farmington, New Mexico (hereafter "the Mesa property"). The Mesa property is more particularly described as follows:

Lot Thirteen (13) and the north five (5) feet of Lot Twelve (12) in Block Six (6) of SUNSET HEIGHTS SUBDIVISION NUMBER TWO in the City of Farmington, San Juan County, New Mexico.

9. The second parcel of real property subject to this civil action is located at 1404 and 1404½ Sullivan, Farmington, New Mexico (hereafter "the Sullivan property"). The Sullivan property is more particularly described as follows:
Lots Four (4) and Five (5) in WEBB SUBDIVISION # 1 in the City of Farmington, according to the plat thereof filed for record in the Office of San Juan County Clerk on May 3, 1956.

10. The third parcel of real property subject to this civil action is located at 200 South (lower, Farmington, New Mexico (hereafter "the South Gower" property). The South Gower property is more particularly described as follows:
0.87 acres, more or less, in the Northwest Quarter of the Northwest Quarter (NWI/4NW1/4) of Section Seventeen (17), in Township Twenty-Nine (29) North of Range Thirteen (13) West, N.M.P.M., San Juan County, New Mexico, described as follows: BEGINNING at the Southeast corner of Lot Eleven (11), in Block One (1) of the Addition to the West Apache Subdivision, as filed for record March 8, 1955;
THENCE North 7.2 feet;
THENCE East 82.5 feet;
THENCE South 111.0 feet;
THENCE South 7711361 West 284.6 feet;
THENCE North 164.9 feet;
THENCE East 195.5 feet to the point of beginning.

11. On September 15, 1965, Defendants Raymond and Lila Spence purchased the Mesa property by

Warranty Deed, and thereby assumed a mortgage held by Mountain States Investment Corporation on that parcel of property.

12. On November 15, 1976, Defendants Raymond and Lila Spence executed a second mortgage on the Mesa property in favor of the First National Bank of Farmington. The First National Bank mortgage was subject and inferior to the Mountain States Investment Corporation mortgage on the Mesa property.

13. On November 22, 1976, Defendants Raymond and Lila Spence purchased the South (lower property by Warranty Deed. On that same date, the Defendants recorded a mortgage on the South (lower property in favor of Four Corners Savings and Loan Association at the San Juan County Clerk's Office in New Mexico at Bk 776, p. 594.

14. On March 6, 1979, Defendants Raymond and Lila Spence purportedly transferred title to the Mesa and South Gower properties to the Universal Church of Taurus Order of Gower.

15. On March 9, 1979, Defendants Raymond and Lila Spence filed Vows of Poverty with the Clerk of San Juan County.

16. On May 4, 1981, Defendant Raymond Spence, as Administrator and Trustee of the Universal Church Order of Gower, and Defendants Lila and Gary Spence, as Trustees of the Universal Church Order

of Gower, recorded a Warranty Deed in the San Juan County Clerk's Office in New Mexico, purportedly transferring title to the South Gower property back to Defendants Raymond and Lila Spence.

17. On September 18, 1981, Defendants Raymond and Lila Spence again transferred title to the South Gower property to the Universal Church of Taurus Order of Gower.

18. On November 9,1981, Defendants Raymond and Lila Spence satisfied First National Bank's second mortgage on the Mesa property. This satisfaction of mortgage was recorded at Book 923, pg. 319 of the San Juan County Clerk's Office in New Mexico.

19. Defendants Raymond and Lila Spence became indebted to the Internal Revenue Service as of April 15, 1980, 1981 and 1982, respectively, even though the Internal Revenue Service did not assess their taxes at those times.

20. On May 14, 1982, Defendants Raymond and Lila Spence submitted income tax returns to the Internal Revenue Service for the 1979, 1980 and 1981 tax years.

21. On March 9,1983, Defendants Raymond and Lila Spence purchased the Sullivan property by Warranty Deed, and thereby assumed a mortgage held by Four Corners Savings & Loan Association

on that parcel of property.

22. On March 30, 1983, Defendants Raymond and Lila Spence purportedly transferred title to the Sullivan property to the Universal Church of Taurus - Order of Sullivan.

23. On July 24, 1986, Defendants Raymond and Lila Spence were convicted by a jury of their peers of three counts each of income tax evasion in violation of 26 U.S.C. §7201 for tax years 1979, 1980, and 1981.

24. On January 27, 1987, the Four Corners Savings & Loan assigned its mortgage on the Sullivan property to Standard Federal Savings & Loan Association, which is located at 101 Lakeforest Boulevard, Gaithersburg, Maryland. This mortgage assignment was recorded at the San Juan County Clerk's Office in New Mexico at Book 1069, Page 139.

25. On September 4, 1987, the Tenth Circuit filed an Order and Judgment in which it affirmed Defendants Raymond and Lila Spence's July 24, 1996 convictions for income tax evasion. In its Order and Judgment, the Tenth Circuit determined that:

    a. Defendants Raymond and Lila Spence transferred all of their real property and much of their personal property to the Universal Church of Taurus;

    b. Defendants Raymond and Lila Spence

continued to enjoy the same standard of living that they had before they personally established the Universal Church of Taurus as its only organizers and then transferring substantially all of their assets to the Universal Church of Taurus;

c. Defendants Raymond and Lila Spence established the Universal Church of Taurus to evade taxes;

d. the Universal Church of Taurus is a sham; and

e. Defendants Raymond and Lila Spence filed incomplete, false or fraudulent income tax returns for tax years 1979,1980 and 1981.

26. On or about March 31, 1988, Defendants Raymond and Lila Spence purportedly conveyed the Mesa, Sullivan and South Gower properties to Defendant Gary Spence by a Special Warranty Deed, and:

a. Defendants Raymond and Lila Spence transferred the properties to their son, Defendant Gary Spence, who is an "insider";

b. Defendants Raymond and Lila Spence have retained possession and control of the properties despite the purported transfers, and Defendants Raymond and Lila Spence have continued to reside on the Mesa property to this day and have not paid Defendant Gary W. Spence any consideration for residing on the Mesa property;

c. Defendants Raymond and Lila Spence

receive all or substantially all of the rental income generated by leasing the Sullivan and South Gower properties;

d. Defendants Raymond and Lila Spence transferred the properties to their son, Defendant Gary W. Spence, after they were convicted of criminal tax evasion;

e. Defendants Raymond and Lila Spence received either no or inadequate consideration for the transfers to Defendant Gary W. Spence;

f. Defendants Raymond and Lila Spence were insolvent or became insolvent shortly after transferring the Mesa, Sullivan and South Gower properties to their son, Defendant Gary Spence.

27. On April 7, 1988, Defendants Raymond and Lila Spence, individually and as Trustees of the Universal Church of Taurus, and Defendants Gary and Vicki Spence, as Trustees of the Universal Church of Taurus, recorded a Special Warranty Deed in the San Juan County Clerk's Office in New Mexico at Book 1086, Page 832, purportedly transferring title to the Mesa, Sullivan and South Gower properties to defendant Gary Wayne Spence.

28. Defendant Gary W. Spence continues to retain record title to the Mesa, Sullivan and South Gower properties in his name, as the nominee for Defendants Raymond and Lila Spence.

29. On June 23, 1988, Defendants Raymond and Lila Spence signed Internal Revenue Service Form 4549-A, entitled "Department of the Treasury - Internal Revenue Service, Income Tax Examination Changes," which listed the Defendants' income tax liabilities for tax years 1979, 1980, and 1981.

30. At the time that Defendants Raymond and Lila Spence signed Form 4549-A, they typed additional language on the form to the effect that they had signed the Form 4549-A under coercion and duress.

31. On July 11, 1988, Defendants Raymond and Lila Spence submitted an income tax return statement entitled "Tax Analysis Schedule" wherein they stated what their income tax liability for the 1979, 1980 and 1981 tax years would be if they were subject to income tax.

32. Beginning on March 20, 1989, Plaintiff made assessments against Defendants Raymond and Lila Spence for unpaid income taxes, statutory interest and additions to tax, for the periods and amounts set forth below. These assessments are evidenced by numerous Certificate of Assessments and Payments for Raymond and Lila Spence for tax years 1979, 1980, and 1981.

TAXABLE PERIOD ENDING	DATE OF ORIGINAL ASSESSMENT	AMOUNT OF ORIGINAL ASSESSMENT
12/31/79	03/20/89	$ 3,524.00(T)
	03/20/89	3,612.00(FP)
	03/20/89	222.00(ETP)
	03/20/89	5,605.04(IT)
	11/12/90	10.00(FEE)
	02/07/94	11.00(FEE)
	03/20/89	$10,919.00(T)
12/31/80	03/20/89	5,460.00(FP)
	03/20/89	695.00
	03/20/89	$14,940.25(IT)
	02/07/94	11.00(F)
	03/20/89	$13,913 .00(T)
	03/20/89	6,957.00(FP)
12/31/81	03/20/89	1,066.00(FTP)
	03/20/89	15,526.66(IT)

(T) - TAX ASSESSED
(I) -INTEREST
(P)- FAILURE TO DEPOSIT AND/OR FAILURE TO PAY PENALTY
(F) - FEES and COLLECTION COSTS

33. Beginning on August 6, 1993, Plaintiff made penalty assessments pursuant to 26 U.S.C. §6702 against Defendant Raymond Spence for filing frivolous returns for the periods and amounts set

forth below:

TAXABLE PERIOD ENDING	DATE OF ORIGINAL ASSESSMENT	AMOUNT OF ORIGINAL ASSESSMENT
12/31/79	09/06/93	$500.00
12/31/80	09/06/93	$500.00
12/31/81	09/06/93	$500.00
12/31/82	09/06/93	$500.00
12/31/83	09/06/93	$500.00
12/31/84	09/06/93	$500.00
12/31/85	09/06/93	$500.00
12/31/86	09/06/93	$500.00
12/31/91	02/21/94	$500.00

34. The Internal Revenue Service has never issued any statutory notices of deficiency to the Defendants for tax years 1979, 1980 and 1981.

35. Defendants Raymond and Lila Spence have failed to fully pay the income tax assessments described in Paragraph 32.

36. Defendant Raymond Spence has failed to pay the § 6702 penalty assessments described in Paragraph 33.

37. Under 26 U.S.C. §§ 6321 and 6322, federal tax liens arose in favor of the Plaintiff against all property and rights to property, whether real or personal, belonging to Defendants Raymond and Lila Spence when the Internal Revenue Service

assessed their taxes on the dates described in Paragraphs 32 and 33.

38. The Mesa, Sullivan and South Gower properties are encumbered with valid tax liens for the Defendants' unpaid tax assessments as described in Paragraphs 32 and 33.

39. On March 30, 1993, the Mountain States Investment Corporation released its mortgage on the Mesa property. This release of mortgage was recorded at Book 1160, Page 885 of the San Juan County Clerk's Office in New Mexico.

40. On October 9, 1990, Plaintiff filed a Notice of Federal Tax Lien with the San Juan County Clerk's Office in New Mexico at Book 1122, Page 522 relating to the assessments made against Defendants Raymond and Lila Spence as set forth in Paragraph 32.

41. On March 18, 1994, Plaintiff filed a Notice of Federal Tax Lien with the San Juan County Clerk's Office in New Mexico at Book 1179, Page 718 relating to the income tax assessments made against the Defendants as set forth in Paragraph 32 in the name of Gary W. Spence "A Nominee For" Raymond and Lila Spence.

42. On April 25, 1994, Plaintiff filed a Notice of Federal Tax Lien with the San Juan County Clerk's Office in New Mexico at Book 1181, Page 791 relating to the income tax assessments made

against defendant Raymond Spence as set forth in Paragraph 33.

43. As of April 27, 1998, Defendants Raymond and Lila Spence were indebted to the Plaintiff in the amount of $177,312 for outstanding income tax deficiencies, plus accrued interest and statutory additions, as provided by law, after April 27, 1998. This amount consists of $21,716 due for 1979, $69,734 due for 1980 and $85,862 due for 1981.

44. Also as of April 27, 1998, Defendant Raymond Spence was indebted to Plaintiff in the amount of $4,500 for §6702 penalties, plus accrued interest, penalties and other additions thereon from the dates of assessments of the penalties as provided by law.

Conclusions of Law

1. This Court has jurisdiction under 28 U.S.C. §§ 1340 1345 and 26 U.S.C. § 7402(a) because Plaintiff United States of America commenced this civil action pursuant to §§ 7401 and 7403 of the Internal Revenue Code, which is an Act of Congress providing for internal revenue.

2. This Court has independent jurisdiction over the counterclaim and cross-claim of Defendant Gary W. Spence, and the cross-claim of Defendants Raymond and Lila Spence, under 29 U.S.C. §§ 1331 and 1340, 26 U.S.C. § 7431, and Fed.R.Civ.P. 13.

3. Venue is proper under 28 U.S.C. § 1396 because Defendants Raymond and Lila Spence reside, the real properties at issue in this suit are located, and the federal taxes in question were accrued in the District of New Mexico.

4. Plaintiff did not have to name the Universal Church of Taurus as a necessary and indispensable party to this suit because the jury determined at the Defendants' criminal trial that the Church is a sham church, a mere alter ego of Defendants Raymond and Lila Spence.

5. Defendants are estopped from denying that the Universal Church of Taurus is a sham church because the Tenth Circuit, on appeal from the Defendants' criminal trial, concluded that the Defendants did not form the Church for the purpose of conducting religious services, but instead formed it for the sole and exclusive purpose of evading or attempting to evade income tax liabilities.

6. Defendants Raymond and Lila Spence are estopped from denying that they formed the Universal Church of Taurus to evade taxes because at their criminal trial, the trial court properly admitted testimony wherein Defendant Lila Spence told co-workers that she and her husband had formed the Church to avoid paying income tax.

7. Defendants Raymond and Lila Spence are estopped from denying that they filed false or fraudulent

income tax returns for tax years 1979, 1980 and 1981 because they were convicted for criminal tax evasion for those years.

8. Plaintiff did not have to comply with 26 U.S.C. §6501's three-year "assessment" statute of limitations because the Defendants' filed false or fraudulent tax returns for tax years 1979, 1980 and1981 with the intent to evade.

9. The statute of limitations period did not begin to run on Plaintiffs attempt to collect Defendants Raymond and Lila Spence's assessed taxes on May 14,1982, the date the Defendants first submitted income tax returns for tax years 1979, 1980 and 1981. Instead, the collection statute of limitations did not begin to run until March 20, 1989, when the Plaintiff first assessed the Defendants' tax deficiencies for tax years 1979, 1980 and 1981.

10. On March 20, 1989, Plaintiff was authorized to assess the tax liability that was shown on a statement entitled "Tax Analysis Schedule" for tax years 1979, 1980, and 1981 without sending any notices of deficiency to the Defendants.

11. The Defendants were not entitled to statutory notices of deficiency because they submitted an income tax return statement entitled "Tax Analysis Schedule" wherein they stated what their income tax liability for the 1979, 1980 and 1981 tax years would be if they were subject to income tax. The Defendants are subject to income tax, so they are

liable for taxes listed and described on the Tax Analysis Schedule.

12. Even if the Defendants were entitled to statutory notices of deficiency, they waived that right and thereby permitted the Plaintiff to assess their tax liabilities without sending them statutory notices of deficiency when they signed Internal Revenue Service Form 4549-A on June 23, 1988.

13. Although Defendants Raymond and Lila Spence claim that they signed Form 4549-A under coercion and duress, the evidence and surrounding circumstances indicate that they were not under duress or coerced when they signed the form.

14. Defendants Raymond and Lila Spence acknowledged that they are responsible for the tax liabilities in question when they signed Form 4549-A free of coercion or duress.

15. The New Mexico Uniform Fraudulent Conveyance Act, NM Stat. Ann. §§ 56-10-1 to -13 (1986), governs the purported transfers in this case because it was the statute that existed at the time of the purported transfers.

16. However, even if the purported transfers were subject to the currently effective New Mexico Uniform Fraudulent Transfer Act, the outcome of this case would still be the same because the Uniform Fraudulent Transfer Act is essentially a recodification of the Fraudulent Conveyance Act

with the term "conveyance" being replaced with the term "transfer" in recognition of the Uniform Fraudulent Transfer Act's applicability to transfers of personal property as well as real property.

17. Plaintiff, as sovereign, is not governed by the State of New Mexico's four-year statute of limitations period, but is instead governed by 26 U.S.C. § 6502's ten-year statute of limitation.

18. Plaintiff attempted to collect the assessed tax deficiencies of Defendants Raymond and Lila Spence for tax years 1979, 1980 and 1981 within the ten-year "collection" statute of limitations period of 26 U.S.C. § 6502 because Plaintiff first assessed these taxes on March 20, 1989 and it filed this civil action on June 23, 1998, less than ten years later.

19. In 1988, at the time the Mesa, Sullivan and South Gower properties were transferred to Defendant Gary Wayne Spence, NMSA § 56-10-4 of the Uniform Fraudulent Conveyance Act provided as follows:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration.

20. The Defendants' purported transfers of the Mesa,

Sullivan and South Gower properties to the Universal Church of Taurus, and the Church's purported transfers of those same properties to Gary Wayne Spence violate NMSA §56-10-4 of the Uniform Fraudulent Conveyance Act because:

a. Defendants Raymond and Lila Spence received no or inadequate consideration for the transfers; and

b. Defendants Raymond and Lila Spence had taken vows of poverty and were already indebted to the Plaintiff for their unpaid 1979, 1980 and 1981 income taxes, so they were insolvent or were rendered insolvent therefrom.

21. The purported transfers of the Mesa, Sullivan and South Gower properties to the Universal Church of Taurus, and the Church's purported transfers of those same properties to Defendant Gary W. Spence were a per se violation of NMSA § 56-10-4 of the New Mexico Uniform Fraudulent Conveyance Act and should be set aside.

22. The Defendants' purported transfers of the Mesa, Sullivan and South Gower properties to the Universal Church of Taurus, and the Church's purported transfers of those same properties to Defendant Gary W. Spence also violate NMSA § 56-10-4 of the Uniform Fraudulent Conveyance Act and should be set aside.

23. In 1988, at the time of the purported transfers, NMSA §56-10-7 of the Uniform Fraudulent Conveyance Act provided as follows:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to binder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors.

24. According to NMSA § 56-10-1 8B of the Uniform Fraudulent Conveyance Act, this Court may consider the following factors in determining actual intent:

a. the transfer or obligation was to an insider;

b. the debtor retained possession or control of the property transferred after the transfer;

c. the transfer or obligation was disclosed or concealed;

d. before the transfer was made or obligation was incurred, the debtor has been sued or threatened with suit;

e. the transfer was of substantially all of the debtor's assets;

f. the debtor absconded;

g. the debtor removed or concealed assets;

h. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

i. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

j. the transfer occurred shortly before or shortly after a substantial debt was incurred; and

k. the debtor transferred the essential assets of the

business to a lienor who transferred the assets to an insider of the debtor.

25. Factors a, b, d, e, h, i and j, as listed in Paragraph 24, weigh against the Defendants. In particular:

a. Defendants Raymond and Lila Spence transferred title to the Mesa, Sullivan and South Gower properties to their son, Defendants Gary Spence, who is an insider;

b. Defendants Raymond and Lila Spence have retained possession and control of the properties despite the purported transfers. The Defendants continue to reside on the Mesa property to this day and do not pay Defendant Gary W. Spence any consideration for residing on the Mesa property. The Defendants also receive all or substantially all of the rental income generated by leasing the Sullivan and South Gower properties;

c. Defendants Raymond and Lila Spence transferred the properties to their son, Defendant Gary W. Spence, after they were convicted of tax evasion, so they knew or should have known that the Plaintiff was likely to initiate legal proceedings against them for the collection of their income tax arrearages, plus penalties and interest for the relevant tax years;

d. Defendants Raymond and Lila Spence received no or inadequate consideration for the transfers;

e. Defendants Raymond and Lila Spence were insolvent or became insolvent shortly after the purported transfers;

f the purported transfers occurred shortly after the Tenth Circuit upheld the Defendants'

convictions for criminal tax evasion, in effect confirming their "debt" to the Plaintiff.

26. Only Factors c and f as listed in Paragraph 24, weigh in favor of the Defendants. In particular:
a. the purported transfers were not concealed;
b. Defendants Raymond and Lila Spence did not abscond.

27. The purported transfers of the Mesa, Sullivan and South Gower properties to the Universal Church of Taurus, and the Universal Church's purported transfers of those same properties to Defendant Gary W. Spence violate NMSA § 56-10-7 of the New Mexico Uniform Fraudulent Conveyance Act because they were intended to hinder, delay or defraud Plaintiff United States of America of taxes due and the transfers should be set aside.

28. Defendants Raymond and Lila Spence remain the true owners of the Mesa, Sullivan and South Gower properties despite purportedly transferring the properties first to the Universal Church of Taurus and then to their son, Defendant Gary Wayne Spence.

29. Defendants Raymond and Lila Spence's purported transfers of the Mesa, Sullivan and South Gower properties were fraudulent conveyances and of no effect as to the Plaintiffs lien claims, and they should be set aside.

30. Likewise, Defendants Raymond and Lila Spence's

purported transfers of the Mesa, Sullivan and South Gower properties were sham transfers and did not operate to transfer ownership of those real properties from them.

31. Plaintiffs federal tax liens should be foreclosed upon the Mesa, Sullivan and South Gower properties which should be ordered sold by the United States Marshal at a judicial sale, and the proceeds of the foreclosure sale should be first applied to the costs of such sale, then to unpaid ad valorem taxes, then to any lien of FirstNationwide Mortgage Corporation in accordance with the previously filed stipulation in this case, and then the balance of the proceeds of the sale should be applied in satisfaction of the tax liens of the Plaintiff.

32. If the balance of the foreclosure sale proceeds distributed to the Plaintiff is insufficient to fully satisfy the tax liabilities of Defendants Raymond and Lila Spence, the Plaintiff will be entitled to a judgment for the deficiency against Defendants Raymond and Lila Spence.

33. Plaintiff United States of America should be awarded its costs and such other relief as is just and proper.

/s/_____
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Counter-Defendant-Appellee

Nos. 99-2325, 99-2345

v.

RAYMOND N. SPENCE; LILA M. SPENCE; GARY WAYNE SPENCE; VICKI L. SPENCE,

Defendants-Counter-Claimants-Cross-Claimants-Appellants,

and

STATE OF NEW MEXICO DEPARTMENT OF TAXATION AND REVENUE,

Defendant-Counter-Claimant-Cross-Defendant-Appellee.

ORDER

Filed January 10, 2001

Before **BALLOCK, KELLY,** and **HENRY**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular service as required by Fed.R.App.P. 35. As no member of the panel and no judge in regular service on the court requested that the court be polled, that petition is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: /s/
Deputy Clerk